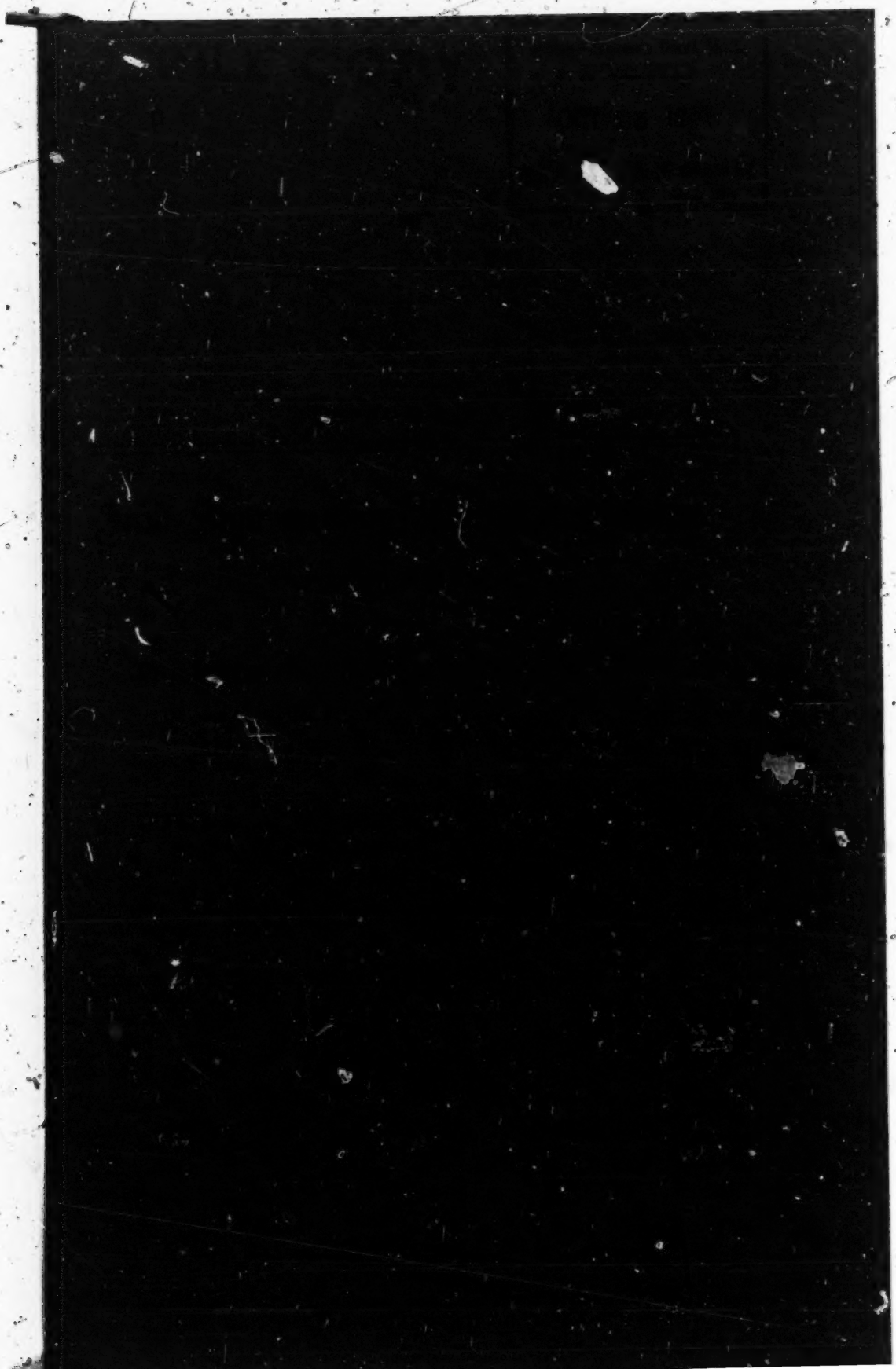
Blank Page



Blank Page

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	6
Summary of Argument	6
Argument:	
The District Court erroneously excluded from the scope of the perjury statute a willfully false denial that a previous statement was made	7
Conclusion	12

CITATIONS

Cases:	
Behrle v. *United States*, 100 F. (2d) 714	12
Blackmon v. *United States*, 108 F. (2d) 572	8
Carroll v. *United States*, 16 F. (2d) 951, certiorari denied, 273 U. S. 763	8
Claiborne v. *United States*, 77 F. (2d) 682	8
Clayton v. *United States*, 284 Fed. 537	9
Hendricks v. *United States*, 223 U. S. 178	8
Leak v. *State*, 61 Ark. 599	9
Luse v. *United States*, 64 F. (2d) 776, certiorari denied, 290 U. S. 651	8
Markham v. *United States*, 160 U. S. 319	8
O'Brien v. *United States*, 99 F. (2d) 368, certiorari denied, 305 U. S. 562	10, 11
Papas v. *People*, 98 Colo. 306	12
Phair v. *United States*, 60 F. (2d) 953	9
Polke v. *State*, 134 Tex. Crim. 496	12
State v. *Sang*, 184 Wash. 444	8
State v. *Studer*, 54 Ohio App. 417	12
State v. *Terry*, 50 Idaho 283	12
State v. *True*, 135 Me. 96	8, 12
United States v. *Golan*, 24 F. Supp. 523	9
United States v. *Creech*, 21 F. Supp. 439	8
United States v. *Norris*, 300 U. S. 564	12
United States v. *Slutzky*, 79 F. (2d) 504	8
United States v. *Wood*, 14 Pet. 430	10
Whitaker v. *State*, 37 Tex. Crim. 479	12
Woolley v. *United States*, 97 F. (2d) 258	8
Statutes:	
Criminal Code, Sec. 125 (U. S. C., Title 18, Sec. 231)	2
Miscellaneous:	
Wigmore on Evidence (3d ed.):	
Sec. 1788	10
Sec. 2043	10

269824—40

Blank Page

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 52

THE UNITED STATES OF AMERICA, APPELLANT

v.

MAY HARRIS, ALIAS KITTY HARRIS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 10–13) is not reported.

JURISDICTION

The order of the court below quashing the indictment was entered March 18, 1940 (R. 14). The Government applied for (R. 14) and was allowed an appeal on March 20, 1940 (R. 15–16). Probable jurisdiction was noted by this Court May 6, 1940. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals

Act, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345).

QUESTION PRESENTED

Whether an indictment alleging that a witness before a grand jury willfully testified falsely that she did not make certain statements to Government agents charges the offense of perjury under Section 125 of the Criminal Code.

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Sec. 231):

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

STATEMENT

The appellant, hereinafter called the defendant, was indicted on October 17, 1939, in the United States District Court for the District of New

Jersey for the crime of perjury under Section 125 of the Criminal Code (R. 1–9). The indictment, which was in one count, charged, in substance, that on October 11, 1939, the defendant was duly sworn as a witness before a lawfully constituted grand jury investigating violations of the income-tax laws; that certain of her testimony set forth in the indictment (R. 5–8) to the effect that she did not make various statements in 1937 to three Government agents [1] was wilfully false in that, as she well

[1] Among the questions and answers set forth in the indictment were the following:

"Q. Now, in October 1937, or thereabouts, did you say to Agents Dickstein, Brennan, and Davis or any of those three that in May of 1932 you went to Ray Born's home in your car in the Inlet District of Atlantic City, N. J.; that you said to Ray Born, 'Everybody is open; how about me? I am back in 219; shall I turn on my lights?' Did you say that to the agents?

"A. I couldn't have; I was closed in 1932. [R. 5.]

* * * * *

"Q. Did you tell the F. B. I. agent in 1937 that you had gone to Johnson's apartment in the Ritz Carlton to see Lou Kissel?

"A. No; the F. B. I. agents was trying to tell me that I had.

"Q. You didn't say that to them?

"A. No. [R. 6.]

* * * * *

"Q. Well, did you say this to the agents after you talked about the colored attorney and the colored people, that within a few days you went to see Ray Born at Turner Hall, and after some effort was able to contact him on the telephone and demanded that he wait at Turner Hall until you got there; that a few minutes later you saw him and said, 'I don't know who is the cause, I don't care who is the cause, I

knew, she did state to the agents that she had gone to Ray Born in 1932 and talked to him about opening a house of prostitution in Atlantic City, that she had spoken to Lou Kissell at certain places in Atlantic City and that she had paid money to James McCullough and had spoken to Born "after her place was closed at 29 North Michigan Avenue" (R. 8). The indictment further alleged that

---

am tired of being tossed around; why should I be closed and why should these niggers get all of a sudden so particular? I am satisfied that 15 North Michigan is the cause and if I don't open those women better get closed up and that Ray Born said, 'Go on home; don't get excited; I am trying to straighten you out.' That the next day the lights at 15 North Michigan Avenue were out. Did you say that to the F. B. I. agents?

"A. I was never in Turners Hall.

"Q. Did you tell the agents that you were in Turners Hall?

"A. Why would I tell the agents about something that I didn't do.

"Q. I am asking if you did.

"A. I couldn't have. I have never been in Turners Hall.

"Q. You didn't tell that to the agents?

"A. I couldn't have; I don't see how I could.

"Q. Did you tell the agents that you had this conversation with Ray Born?

"A. I didn't have a conversation with Ray Born.

"Q. Did you tell the agents that you had that conversation with Ray Born?

"A. I don't see how I would. I wouldn't tell the F. B. I. agents something that didn't happen to be effective about it. I have never been in Turners Hall; why would I tell them that I had been? [R. 6–7.]

"Q. Did you say this to the agents, that shortly after your house and Poppy's house were allowed to open in the summer

whether the defendant made these statements to the Government agents was a matter material to the inquiry conducted by the grand jury, the other matters alleged to be material being whether the proprietors of houses of prostitution in Atlantic City obtained permission to conduct their business without official molestation, what payments were made for such permission and to whom they were made, whether certain individuals, including James McCullough, received payments and delivered them to Raymond R. Born and whether Born, Undersheriff of Atlantic County, New Jersey, gave assurances of protection (R. 3–4).

---

of 1936 a young man who you were told by the agents was James McCullough, but whose name you did not know at the time, came to your house; that you recognized him as being a man whom you had seen at Slotty's place on North Kentucky Avenue when you previously made payments there for your houses on North North Carolina Avenue; that this young man said to you, 'Do you want to see me today?' That you said, 'I will see you Sunday and every Sunday; I prefer Sunday.' Did you say that to the agents?

"A. Couldn't of. The first time that I saw this boy that you all call McCullough was right here in this hall outside of this door this last month some time. [R. 7.]

* * * * *

"Q. Didn't you tell these agents on October 27, 1937, or if you don't remember the date, didn't you tell the agents about that time that you recognized James McCullough as a man who collected the money?

"A. I told them that this man that I thought looked like the man I had seen in this man's office after that I discovered that it was not the man and it was this woman's driver. In this hall here when they really showed me the boy, then it was not the man I saw in Trenton. [R. 8.]

On January 16, 1940, the defendant filed a motion to quash the indictment on the ground that it did not charge an offense against the United States (R. 9). On February 14, 1940, the District Court filed an opinion sustaining the motion (R. 10–13), and on March 18, it ordered the indictment quashed, having, as the order stated, "determined that the indictment does not charge an offense under the statute" (R. 14).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that a false denial under oath by a witness before a grand jury that she had theretofore made certain statements to Government agents did not constitute a violation of the perjury statute, even though the fact that she had made the statements was material to the grand jury inquiry;

2. In holding that the indictment did not charge an offense under the perjury statute;

3. In quashing the indictment.

SUMMARY OF ARGUMENT

The decision of the District Court excluded from the scope of the perjury statute those cases where a person under oath falsely denies having made a prior statement. In reaching this result, the court disregarded the obvious distinction between a false denial of the fact that a previous statement was made and a contradiction of the previous statement. It, therefore, relied upon inapplicable deci-

sions, holding that evidence that the defendant made a contradictory statement at another time was insufficient to prove the falsity of the perjurious statement alleged.

There is no authority for the view that the perjury statute affords a special immunity to a wilfully false denial of the *fact* that a previous statement was made. There is, on the contrary, authority that it does not. The denial of the fact that certain statements have been made may obviously be as clear, deliberate, and material falsehood as the denial of any other fact. An exemption from liability for such false denials will, moreover, significantly enhance the difficulties of prosecution, since statements made to Government agents in the course of their investigations or to grand juries are inevitably one of the bases upon which criminal proceedings are instituted and indictments returned.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY EXCLUDED FROM THE SCOPE OF THE PERJURY STATUTE A WILLFULLY FALSE DENIAL THAT A PREVIOUS STATEMENT WAS MADE

The opinion of the District Court concedes that the indictment sufficiently alleged that the grand jury was regularly convened, that the defendant was duly sworn as a witness, and that the questions asked of her were material to the issue being in-

vestigated (R. 11).[2] It properly states that the Government's case "is based entirely upon the fact that defendant, as a witness before the Grand Jury, denied that she made certain statements to the agents, whereas in fact she did make such statements" (R. 10). The opinion does not question either the sufficiency of the defendant's testimony as set forth in the indictment to constitute denials, categorical or argumentative, that she made the previous statements alleged or the sufficiency of the allegations that the denials were knowingly false. Nevertheless, the court held that the indictment failed to allege an offense under the statute because "the allegations in an indictment necessary to show the commission of the offense

[2] This Court has held that it is sufficient in an indictment for perjury either to allege materiality generally or to allege a false statement which appears on its face to be material. *Markham* v. *United States*, 160 U. S. 319, 325; *Hendricks* v. *United States*, 223 U. S. 178, 184. See also *Woolley* v. *United States*, 97 F. (2d) 258, 261 (C. C. A. 9th), certiorari denied, 305 U. S. 614. The indictment alleged that the defendant's false testimony was material. (R. 3, 4–5.) Moreover, its materiality is apparent, since her false denial bore directly on her credibility as a witness (*cf. Luse* v. *United States*, 64 F. (2d) 776, 777 (C. C. A. 9th); certiorari denied, 290 U. S. 651; *Claiborne* v. *United States*, 77 F. (2d) 682, 691 (C. C. A. 8th); *United States* v. *Slutzky*, 79 F. (2d) 504, 505 (C. C. A. 3d); *Blackmon* v. *United States*, 108 F. (2d) 572, 573 (C. C. A. 5th)), and, as the indictment alleged (R. 5), tended to obstruct the grand jury investigation (*Carroll* v. *United States*, 16 F. (2d) 951, 953 (C. C. A. 2d), certiorari denied, 273 U. S. 763; *State* v. *True*, 135 Me. 96, 100; *State* v. *Sang*, 184 Wash. 444, 449. See also *Woolley* v. *United States*, *supra*; *United*

must charge that the testimony given was untrue in fact, and * * * perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses." (R. 11.) Thus the District Court treated a charge of perjury founded on a false denial that a previous statement was made as the legal equivalent of a charge that the defendant made contradictory statements. The effect of the decision is to exclude from the scope of the perjury statute those cases where a person under oath falsely denies having made a prior statement.

That the court below regarded as immaterial the obvious distinction between a false denial of the fact that a previous statement was made and a contradiction of the previous statement is fully indicated by the decisions upon which the court relied.[3] These decisions held that evidence of a contradictory statement made by the defendant at another

---

States v. *Creech*, 21 F. Supp. 439, 440 (D. D. C.)). The decision in *Leak* v. *State*, 61 Ark. 599, that a denial that an earlier statement had been made is immaterial ignores both these grounds of materiality.

[3] *Clayton* v. *United States*, 284 Fed. 537 (C. C. A. 4th); *Phair* v. *United States*, 60 F. (2d) 953 (C. C. A. 3d); *United States* v. *Golan*, 24 F. Supp. 523 (E. D. Pa.).

time was insufficient to prove the falsity of the perjurious statement alleged, whether they are supported by the fact that the law of contradiction does not indicate which of two contradictories is false, need not be determined in the present case.[4] Whatever their validity, they are inapplicable where the charge, as the court below recognized, is not that the defendant falsely denied the truth of her former statements but that she falsely denied that she made them. The distinction turns on whether the truth of the former statement or only the fact that it was made is employed to establish the falsity of the perjurious statement alleged. The logical analogy is the doctrine that the hearsay rule does not apply to an extrajudicial statement when offered circumstantially to prove something other than the truth of the statement. See Wigmore, *Evidence* (3d ed.) § 1788.

While there is thus no authority for the view that the perjury statute affords a special immunity to willfully false denials of the fact that a previous statement was made, there is authority that it does not. In *O'Brien* v. *United States,* 99 F. (2d) 368 (App. D. C.), certiorari denied, 305 U. S. 562, the defendant had stated to the police that he had been assaulted by certain persons. When those whom

[4] That the nature of the contradictory statements or the circumstances under which they are made may sometimes suffice to permit a jury to determine which is false is indicated by the decision of this Court in *United States* v. *Wood,* 14 Pet. 430. See also Wigmore on Evidence (3d ed.) § 2043.

he named as his assailants were brought to trial, the defendant was called as a witness against them. He testified, among other things, that he had not made certain material parts of the statement. Because of the alleged falsity of this testimony, he was tried and convicted of perjury. On appeal, the defendant urged that the trial court erred in admitting in evidence the statement he had made to the police because it had been procured by threats and promises. In sustaining the conviction, the Court of Appeals declared that the sole issue in the perjury prosecution was whether the defendant falsely denied having made the statement. Consequently, the court held the evidence was properly admitted, despite the claim of duress, because (p. 369) "it was not the truth or falsity of what he said which was involved, but simply the fact of his having said it."

The *O'Brien* case did not, as the opinion below states (R. 13), sustain "a conviction based upon the making of contradictory statements". The Court of Appeals stated in unambiguous terms (p. 369) that the conviction was based upon the defendant's testimony that "a fact which indisputably occurred [the making of the statement], did not occur." And while it is true that the precise question before the Court of Appeals in the *O'Brien* case was the admissibility of the statement, the decision is clear authority for the position that a false denial of the material fact that a certain statement

had been made constitutes perjury, regardless of the truth or falsity of the statement itself.[5]

The Government's position that a false denial of the fact that a previous statement was made may constitute perjury, regardless of the truth or falsity of the prior statement, is also upheld by decisions of state courts.[6]

The elements of perjury under the statute are, as this Court has indicated, that the sworn statement must be deliberately untrue and that it be material. *United States* v. *Norris*, 300 U. S. 564, 574. If the decision of the District Court is permitted to stand, an exception will have been established which creates a wholly unwarranted differentiation among persons who make willfully false statements. The denial of the fact that certain statements have been made may obviously be as clear, deliberate, and material a falsehood as the denial of any other fact. Such an exception may, moreover, substantially impede the effective administration of criminal law. Statements made to Government agents in the course of their investigations or to grand juries are

---

[5] A similar result was reached by the same court in *Behrle* v. *United States*, 100 F. (2d) 714, where the defendant's false testimony was not that he did not make the former statement but that he did not remember having made it. This distinction presented an additional evidential problem, but the principle determinative of liability is the same.

[6] *State* v. *True*, 135 Me. 96; *Whitaker* v. *State*, 37 Tex. Crim. 479; *Polke* v. *State*, 134 Tex. Crim. 496; *Papas* v. *People*, 98 Colo. 306; *State* v. *Studer*, 54 Ohio App. 417; *State* v. *Terry*, 50 Idaho 283.

inevitably one of the bases upon which criminal proceedings are instituted and indictments returned. If the fact that such statements have been made may subsequently be denied with impunity, it is evident that the difficulties of prosection will be significantly enhanced. No justification either in law or in policy has been adduced for this result.

CONCLUSION

The indictment charged an offense under the perjury statute, and it is therefore respectfully submitted that the order of the District Court quashing the indictment should be reversed.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
JOSEPH W. BURNS,
HERBERT WECHSLER,
Special Assistants to the Attorney General.

OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940